

Supreme Court, U.S.

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In The

**Supreme Court of the United States**

October Term, 1996

In re:

**DENISE RENEÉ BEASLEY.****FIDELITY FINANCIAL SERVICES, INC.,***Petitioner,**v.s.***RICHARD V. FINK, Trustee,***Respondent.**On Writ of Certiorari to the United States  
Court of Appeals for the Eighth Circuit*

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**BRIEF FOR PETITIONER**

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**QUESTION PRESENTED FOR REVIEW**

Whether the acquisition and perfection of a security interest in the debtor's automobile by Fidelity Financial Services, Inc. constituted a preferential transfer which the bankruptcy trustee could avoid pursuant to 11 U.S.C. § 547.

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**OPINIONS BELOW**

The Eighth Circuit opinion is reported at *In Re Beasley, Fink v. Fidelity Financial Services, Inc.*, 102 F.3d 334 (8th Cir. 1996). (Appendix to Petition, A.) The District Court's opinion is unreported but can be found in the appendix to Fidelity's Petition. (Appendix to Petition, B). The Bankruptcy Court's opinion is reported at *In Re Beasley, Fink v. Fidelity Financial Services, Inc.*, 183 B.R. 857 (Bkrtcy. W.D. Mo. 1995). (Appendix to Petition, C, D.)

**STATEMENT OF JURISDICTION**

This proceeding is for the purpose of seeking review from the United States Court of Appeals for the Eighth Circuit decision in *In Re Beasley, Fink v. Fidelity Financial Services, Inc.*, 102 F.3d 334 (8th Cir. 1996). The Court of Appeals entered its Order on November 27, 1996. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on a Writ of Certiorari the Eighth Circuit decision referenced above.

**STATUTORY PROVISIONS OF LAW****11 U.S.C. § 547**

\* \* \*

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.]

(B) the transfer had not been made; and

(C) such creditor receive payment of such debt to the extent provided by the provisions of this title [11 USCS 101 et seq.]

(c) The trustee may not avoid under this section a transfer —

\* \* \*

(3) that creates a security interest in property acquired by the debtor —

(A) to the extent such security interest secures new value that was

—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

\* \* \*

(e) (1) For the purposes of this section —

\* \* \*

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) for the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made —

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —

- (i) the commencement of the case; or
- (ii) 10 days after such transfer takes effect between the transfer and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

**Mo. Rev. Stat. 301.600.**

\* \* \*

2. A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement and the required

certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This is a bankruptcy proceeding in which Fidelity Financial Services, Inc., ("hereinafter Fidelity") is attempting to enforce its rights as a secured creditor of the debtor, Denise Renee Beasley. The Trustee in Bankruptcy, Richard Fink, sought to avoid Fidelity's security interest as a preferential transfer under 11 U.S.C. § 547. The Bankruptcy Court, District Court and Eighth Circuit have all ruled in the Trustee's favor.

### **B. Course of Proceedings**

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on November 18, 1994. United States Bankruptcy Court, Western District of Missouri: Case No. 94-43096-13. The Debtor converted the proceedings to a case under Chapter 13 of the Bankruptcy Code on February 21, 1995. On May 8, 1995, the Trustee filed a complaint to set aside Fidelity's lien on an automobile owned by the Debtor as a preferential transfer. The Honorable Frank W. Koger, Chief Bankruptcy Judge, United States District Court for the Western District of Missouri, sustained the Trustee's position and judgment was entered July 25, 1995 and amended on August 28, 1995. Fidelity filed its Notice of Appeal with the District Court on July 24, 1995, and filed an Amended Notice of Appeal with the District Court on July 25, 1995. The District Court had jurisdiction to hear Fidelity's appeal from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). The appeal was from an Order entered in a "core" proceeding referred to the Bankruptcy Judge under 28 U.S.C. § 157(b)(2) and was made to the district judge in the judicial district

in which the bankruptcy judge serves. For these reasons, the appeal was properly before the District Court.

On appeal to the District Court, Honorable Ortrie D. Smith, Judge, United States District Court, Western District of Missouri, Western Division, affirmed the Bankruptcy Court. United States District Court, Western District of Missouri: Case No. 95-0797-CV-W-3. Final judgment was entered in the District Court on February 9, 1996. Fidelity filed its Notice of Appeal to the Eighth Circuit Court of Appeals on February 9, 1996. The appeal to the Eighth Circuit was from a final judgment entered under 28 U.S.C. § 158(a). Accordingly, the Eighth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 158(d).

On November 27, 1996, the Eighth Circuit issued its opinion affirming the Bankruptcy Court and the District Court.

This Court granted Fidelity's Petition for Writ of Certiorari on May 12, 1997.

#### C. Statement of Relevant Facts

1. On or about August 17, 1994, Fidelity Financial Services, Inc. ("Fidelity") financed the purchase of a 1994 Ford Probe, VIN #1ZDLT20A4R5133799, by Denise R. Beasley ("Beasley"), Debtor. At that time, Beasley executed and delivered a Note and Security Agreement to Fidelity. (Appendix to Petition, Exhibit F).

2. August 17, 1994 was the 229th day of 1994. (Appendix to Petition, Exhibit F).

3. On or about September 7, 1994 (21 days later), Fidelity mailed an Application for Missouri Title and License (a "blue slip") to the Missouri Department of Revenue, together with the requisite fee. (Appendix to Petition, Exhibit F).

4. The "blue slip" (which is the secured party's copy of the

Application for Title) was subsequently processed by the Department of Revenue and returned to Fidelity with a "filed date" of September 23, 1994. (Appendix to Petition, Exhibit F).

5. At Fidelity's request, Susan M. Venturella, Senior Counsel for the Missouri Department of Revenue, investigated the delivery date of the Application for Title, and determined that said Application was actually received by the Department of Revenue on September 12, 1994 (26 days after creation of the debt and security interest). (Appendix to Petition, Exhibit F).

6. On November 18, 1994, Beasley filed a Petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Missouri, and Gary D. Barnes was appointed interim Trustee. (Appendix to Petition, Exhibit F).

7. November 18, 1994 was the 322nd day of 1994, 93 days after the transfer by Beasley of the security interest to Fidelity. (Appendix to Petition, Exhibit F).

8. Fidelity is not an insider pursuant to 11 U.S.C. § 547. (Appendix to Petition, Exhibit F).

9. Fidelity filed a claim on December 16, 1994 in the amount of \$14,670.15 but did not place a value on the security. (Appendix to Petition, Exhibit F).

10. The parties agree that the value of the vehicle is \$14,000. (Appendix to Petition, Exhibit F).

11. At the 341 Meeting of Creditors on December 19, 1994, Gary D. Barnes, Trustee ("Barnes"), announced that he intended to file an adversary action to avoid Fidelity's lien because the Application for Title was received more than 20 days after the loan was made (despite the fact that § 301.600 R.S. Mo. provides that a lien is perfected:

... by the delivery to the Director of Revenue

*[of] . . . an Application for Certificate of Ownership containing the name and address of the lienholder and the date of the Security Agreement, and the required Certificate of Ownership fee [and] is perfected as of the time of its creation if the delivery of the aforesaid to the Director of Revenue is completed within 30 days thereafter, otherwise as of the time of the delivery . . .*

(Emphasis added) (Appendix to Petition, Exhibit F).

12. The Trustee also demanded the Debtor surrender the vehicle or pay the estate \$2,500 and reaffirm the debt to Fidelity or convert to a Chapter 13, meet the best interest of creditors test, agree to refrain from filing a second bankruptcy for 180 days if the present case was dismissed, and pay the Trustee his fees, estimated at \$500, over three months. (Appendix to Petition, Exhibit F).

13. Rather than accept any of these options, the Debtor converted these proceedings to a case under Chapter 13 on February 21, 1995, and filed a Plan proposing to avoid Fidelity's lien, to treat Fidelity as an unsecured claimant, and to pay the nonexempt value of the vehicle to her creditors pursuant to 11 U.S.C. § 1305(a)(4). (Appendix to Petition, Exhibit F).

14. On March 30, 1995, Fidelity filed its Objection to Confirmation under § 1325(a)(5) of the Bankruptcy Code asserting that the Plan failed to provide for Fidelity to retain its lien and receive property of a value which is not less than the allowed amount of Fidelity's claim. (Appendix to Petition, Exhibit F).

15. Also on March 30, 1995, the Debtor announced at her § 341 meeting that she wanted to have a ruling on whether the lien could be avoided in order to show good faith to the unsecured creditors. She said she understood that should would either pay Fidelity or the unsecured creditors the value of the vehicle. (Appendix to Petition, Exhibit F).

16. Since the avoidance of the lien would benefit the estate the Trustee agreed to let the debtor's counsel represent him in the effort to determine whether Fidelity had obtained a preference. (Appendix to Petition, Exhibit F).

17. On or about May 8, 1995, Richard V. Fink, Chapter 13 Trustee, filed a Complaint to Set Aside Preference on the grounds that Fidelity did not perfect its lien on or before 20 days after the Debtor received possession of the security, that the lien was therefore a transfer to Fidelity on account of an antecedent debt made while the Debtor was insolvent and enabling Fidelity to receive more than it would have received as an unsecured claimant. (Appendix to Petition, Exhibit F).

18. This is a "core proceeding" within the meaning of 28 U.S.C. § 157(b)(2)(F) over which the Court has jurisdiction of the subject matter. (Appendix to Petition, Exhibit F).

19. On appeal, the District Court affirmed the Bankruptcy Court's decision.

20. On appeal to the Eighth Circuit, the Court of Appeals affirmed the District Court. United States Court of Appeals for the Eighth Circuit, Case No. 96-1430.

21. This Court granted Fidelity's Petition for Writ of Certiorari on May 12, 1997.

#### SUMMARY OF ARGUMENT

1. Fidelity acquired a purchase money security interest in the debtor's property on August 17, 1994. The stipulated facts show that Fidelity perfected its security interest in the Debtor's property within thirty days of the transfer. Pursuant to Mo. Rev. Stat. § 301.600.2, Fidelity's lien was perfected on August 17, 1994, the date of the transfer. Under § 547(e)(1)(B), "a transfer . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien

that is superior to the interest of the transferee." Accordingly, Fidelity was perfected within the 20 day grace period set forth in § 547(c)(3)(B) and may avail itself of the enabling loan exception to the trustee's power to avoid preferences because no creditor could acquire a judicial lien superior to Fidelity's after August 17, 1994. The Eighth Circuit's decision that determination of perfection in preference cases should be made without reference to state grace periods is inconsistent with the plain language of § 547(e)(1)(B).

2. The Eighth Circuit's decision is inconsistent with decisions of the Tenth and Eleventh Circuits. The reasoning of the Tenth and Eleventh Circuits as set forth in *In re Hesser*, 984 F.2d 345 (10th Cir. 1993) and *In re Busenlehner*, 918 F.2d 928 (11th Cir. 1990), *cert. denied*, *Moister v. General Motors Acceptance Corp.*, 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991) should be adopted by this Court.

## ARGUMENT

### I.

#### THE EIGHTH CIRCUIT'S DECISION IS CONTRARY TO THE PLAIN LANGUAGE OF 11 U.S.C. § 547(e)(1)(B).

Fidelity financed the Debtor's purchase of an automobile on August 17, 1994. At that time, Debtor executed a promissory note and security agreement in favor of Fidelity. Fidelity mailed the documents to perfect its lien to the Missouri Department of Revenue on September 7, 1994, or 21 days after the security interest was granted. The Department of Revenue received those documents 26 days after the date the Debtor signed the note and security agreement and delivered same to Fidelity. Because the last steps necessary to perfect Fidelity's lien in the Debtor's property were taken within 90 days of the date Debtor filed her petition in bankruptcy, the Trustee sought to avoid the security interest as a preferential transfer pursuant to 11 U.S.C. § 547(b).

Fidelity contends its security interest in the Debtor's automobile comes within one of the statutory exceptions to the trustee's power to avoid preferential transfers. 11 U.S.C. § 547(c)(3) provides that the Trustee may not avoid a transfer that creates a purchase money security interest in property acquired by the Debtor if the security interest is perfected on or before 20 days after the Debtor receives possession of the property. The Eighth Circuit ruled that Fidelity could not avail itself of this exception to the Trustee's avoidance power because Fidelity did not take the last steps necessary to perfect its security interest in the debtor's property within 20 days after the date Debtor took possession of the automobile.

Fidelity asserts that in reaching the conclusion that it did not perfect its security interest within the 20 day time period set forth in 11 U.S.C. § 547(c)(3)(B), the Eighth Circuit did not properly consider 11 U.S.C. § 547(e)(1)(B) which provides "for the purposes of this section . . . the transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of a transferee." In this case, Fidelity was perfected on April 17, 1994, the date of transfer, due to its compliance with Mo. Rev. Stat. § 301.600.2 which provides in relevant part:

*A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, and application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within 30 days thereafter, otherwise as the time of the delivery.*

Due to Fidelity's compliance with Mo. Rev. Stat. § 361.600.2, no creditor on a simple contract could acquire a judicial lien superior to Fidelity's after August 17, 1994. However, the Eighth Circuit, citing with approval a decision by the Bankruptcy Appellate Panel for the Ninth Circuit, *In re Loken*, 175 B.R. 56 (BAP 9th Cir. 1994) concluded that determining perfection without reference to state grace periods is consistent with Congress's desire to have a "uniform rule throughout the country." It found persuasive the argument that it is not possible to say that other creditors cannot obtain rights superior to the transferee until the transferee takes the last step required by state law to perfect its security interest.

The Eighth Circuit decision is inconsistent with the plain language of § 547(e)(1)(B) which defines when a transfer is perfected for purposes of preference law under § 547. Where the resolution of a case depends upon construction of a statute and Congressional intent, this Court first looks to the statutory language and then to legislative history if the statutory language is unclear. *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S. Ct. 2197 (1991). The language of § 547(e)(1)(B) is clear. Contrary to the Eighth Circuit's assertion, § 547(e)(1)(B) requires reference to state grace periods in determining perfection.

## II.

### THE EIGHTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS BY THE TENTH AND ELEVENTH CIRCUITS.

Two Circuit Courts of Appeal have addressed this precise issue and have concluded that security interests in vehicles properly perfected under State vehicle perfection statutes are not subject to attack as preferential transfers even if the physical act of perfection occurs beyond the grace period set forth in § 547(c)(3)(B), since the security interest is deemed perfected under State law the moment that the security interest is created. In *In re Busenlehner*, 918 F.2d 928 (11th Cir. 1990), cert. denied, *Moister v. General Motors*

*Acceptance Corp.*, 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991). Alfred D. Busenlehner and Faye Elaine Busenlehner (the Busenlehners), Debtors, purchased a car and entered into an Installment Sales Contract and Security Agreement on March 31, 1988 which was subsequently assigned to GMAC. On April 13, 1988, the Georgia Department of Motor Vehicles received a "MV-1 Title Application", thereby perfecting GMAC's security interest under Georgia law (which provides that a security interest in a motor vehicle is perfected as of the time of its creation if the title application is delivered to the Department of Motor Vehicles within 20 days.) The Debtors filed a Petition under Chapter 7 of the Bankruptcy Code on April 26, 1988 and the Chapter 7 Trustee then brought an adversary action against GMAC to set aside GMAC's lien as a preferential transfer (because perfection was not accomplished within 10 days as required by § 547(c)(3)). GMAC argued that the security interest was not avoidable because § 547(e)(1)(B) permits the use of State relation-back statutes. Hence, the physical act of perfection did not need to occur within the 10 days grace period so long as, under State law, the security interest was deemed perfected within that period. This case was decided prior to the 1994 amendments to the bankruptcy code which extended the grace period of § 547(c)(3) from 10 to 20 days.

The Bankruptcy Court sustained the Trustee's Motion for Summary Judgment, and the District court reversed. On appeal, the Eleventh Circuit affirmed the District Court, stating:

*§ 547(c)(3) prevents Trustees from avoiding enabling loans that meet certain conditions. In the case at hand, the only dispute is whether the secured loan complied with the requirement that the loan be "perfected on or before 10 days after the debtor received possession" of the property. 11 U.S.C.A. § 547(c)(3)(B). The Trustee argues that the security interest was perfected on the 13th day following the signing of the security agreement. GMAC argues that*

*under § 547(c) the physical act of perfecting a lien does not need to occur within the 10 day period as long as, under State law, the security interest is deemed perfected within that period. [Emphasis added.]*

*The issue that confronts us in this case is the meaning of § 547(c)(3)(B)'s phrase "perfected on or before 10 days". The Code defines the phrase in § 547(e)(1)(B). § 547(e) governs the timing, for preference purposes, when a transfer is made and when a transfer is perfected. This case presents this panel with a dispute over the latter event. § 547(e)(1)(B) states: "a transfer . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee."*

*Thus, in order to determine when perfection occurs under § 547, it is necessary to ascertain when the perfected security interest can beat a judicial lien in a priority battle. As this court held in a related context, "this determination must be made by reference to State law" . . . [citation omitted]*

*Therefore we must turn to Georgia State law to determine when the perfected security interest can beat a judicial lien in a priority battle . . . Georgia law states that a security interest in a motor vehicle is perfected as of the date of its creation if the delivery [to the Department of Motor Vehicles of the proper documents] is completed within 20 days . . . In the case at hand, the correct documents were delivered to the Commissioner within the*

*statutory 20 days. Under State law, the security interest was deemed to have been perfected the moment that the security interest was created . . .*

*Because the Bankruptcy Code adopts state law under § 547(e)(1)(B), the date of perfection for preference actions in this case is the date of the initial enabling loan. Therefore GMAC perfected the enabling loan within the necessary 10 day period.*

*This conclusion is supported by the policies underlying preference law. The goal of the drafters of this provision of the 1978 Bankruptcy Reform Act was to bring preference law "more into conformity with commercial practices and the Uniform Commercial law" [citation omitted]*

*Creditors are encouraged by our legal system to secure their loans. The general message to creditors is that should they follow State Commercial Law their secured loans will be protected in Bankruptcy.*

*By limiting the effect of State relation-back statutes in Bankruptcy, legitimate commercial practices are penalized. To hold for the Trustee in this case may be beneficial in that it creates a larger estate to pay administrative expenses and unsecured claims . . . The creditor, moreover, lent the money in the expectation that the creditor's compliance with State law was sufficient to protect the loan. Debtors should not be given the ability to surprise and upset established commercial practices by*

*filing for Bankruptcy and avoiding this otherwise acceptable security interest.*

In *In re Hesser*, 984 F.2d 345 (10th Cir. 1993), James and Doris Hesser (the Hessers), Debtors, purchased and took possession of a 1990 Toyota on April 16, 1990. The Hessers executed a Retail Installment Sales Contract and Security Agreement which was subsequently assigned to General Motors Acceptance Corporation (GMAC). On the date of purchase, the seller executed and delivered a "Lien Entry Form" to the motor license agent (Oklahoma law provides that perfection of a security interest in a vehicle relates back to the date of purchase if a lien entry form is presented to the Oklahoma Tax Commission or its agent within 15 days of purchase). The lien entry form was actually received by the Oklahoma Tax Commission on May 1, 1990 (the 15th day after purchase). On May 18, 1990, the Hessers filed a Petition under Chapter 7 of the Bankruptcy Code. The Chapter 7 Trustee then filed an action to set aside GMAC's security interest as a preference pursuant to 11 U.S.C. § 547(b) (because the transfer was allegedly "for or on account of an antecedent debt owed by the debtor before such transfer was made since same was perfected more than 10 days after the execution of the security agreement and the creation of the debt occurred prior to, and not contemporaneously with the transfer of the security interest"). GMAC countered that the transfer was contemporaneous with the creation of the debt because, under Oklahoma State law, perfection automatically related back to the date of purchase. Further, said transfer was a contemporaneous exchange for new value. The Trustee filed a Motion for Summary Judgment which was granted by the Bankruptcy Court and affirmed by the District Court. On appeal, the Tenth Circuit reversed and stated:

*The sole issue in dispute is the appropriate timing and method of the perfection of a security interest provided for in § 547 of the Bankruptcy Code. We agree with the 11th Circuit that the Bankruptcy Code adopts State*

*law to determine the date of perfection under § 547(e)(1)(B) . . . [citation omitted]*

*§ 547(e)(1)(B) . . . applies to the perfection of a transfer of a fixture or property other than real property and provides "for purposes of this § a transfer . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee . . ."*

*Thus, in order to determine the date of perfection, it is necessary to determine when the perfected security interest can beat a judicial lien in a priority battle . . . This determination is made by reference to state law . . .*

*After the date of perfection is determined, the time of the transfer must be ascertained and must fit within the 10-day grace period provided in § 547(e)(2) . . . Thus, § 547(e) provides for a two step process: first, determine the date of perfection according to state law pursuant to § 547(e)(1)(A) or (B), and second, determine the time of transfer pursuant to § 547(e)(2).*

*Because under Oklahoma law, GMAC's security interest was perfected on April 16, April 16 is also the date that GMAC's security interest was perfected for purposes of § 547 because it is the date on which "a creditor on a simple contract cannot acquire a judicial lien that is superior" to the secured creditor GMAC. Because the date of the perfection coincides with the date on which the security interest*

*was granted, the transfer of the security interest was not "for or on account of an antecedent debt" 11 U.S.C. § 547(b)(2), and also was "perfected on or before 10 days after the debtor received possession of the property" 11 U.S.C. § 547(c)(3)(B). Therefore, because the Trustee cannot meet all of the elements necessary to avoid the transfer pursuant to § 547(b) and furthermore, GMAC can claim protection under § 547(c)(3), the transfer cannot be avoided by the Trustee. [Emphasis added.]*

The Court in *In re Power*, 133 B.R. 242 (Bkrtcy. N.D. Okla. 1991), addressed the same issue and reached the same result. On March 7, 1991, Judi E. Beaumont (Beaumont), Debtor, purchased and took possession of a 1989 GMC pickup truck, and executed a Retail Installment Contract and Security Agreement (which was assigned to GMAC). GMAC perfected its interest by filing a lien entry form with the Oklahoma Tax Commission on March 22, 1991 (15 days later). On April 10, 1991, Beaumont filed a Chapter 7 Petition. Thereafter, the Chapter 7 Trustee filed a complaint to avoid GMAC's lien as a preferential transfer because the act of perfection did not occur within the 10 day grace period prescribed by 11 U.S.C. § 547(e)(2). GMAC argued that its lien perfection on Day 15 related back to Day 1 under Oklahoma State law and the granting of the security interest was therefore legally contemporaneous with the creation of the debt. Hence, no transfer was made on account of an antecedent debt.

The court granted Summary Judgment in favor of GMAC citing *In Re Busenlehner*:

[2] The exact issue before this Court was before the Eleventh Circuit, in *In re Busenlehner*, 918 F.2d 928, 930 (11th Cir. 1990). In this case, the Trustee brought an

*adversary proceeding against GMAC to recover a preference. GMAC had perfected its security interest in a motor vehicle thirteen days after the purchase and execution of the security agreement, but within the twenty-day grace period allowed by the state statute. The state statute provided, as does the Oklahoma Statute, that if perfected within the allotted time, the lien relates back to the day of execution of the security agreement. The Court held in favor of GMAC finding perfection related back to the date of the security agreement. Therefore, perfection occurred within 10 days of the transfer of the security interest and GMAC's lien is excepted from avoidance under 11 U.S.C. § 547(c)(3)(B) as not being on account of an antecedent debt. The creation of the debt and the transfer of an interest of the debtor in property as collateral for that debt happened contemporaneously.*

\* \* \*

*The Court points out that in the Hamilton case the applicable state statutes allowed a twenty-day grace period for perfection of the security interest but did not provide perfection to relate back to Day One, if the lien was perfected timely. In the Matter of Hamilton, 892 F.2d 1233, nn. 14-15.*

*This Court believes the Bankruptcy Code clearly states that the transfer occurs on Day One if the lien is perfected within ten days. Under Oklahoma law, the lien of GMAC was deemed perfected on Day One even though the physical act of perfection occurred on Day*

*15. The Bankruptcy Code does not say the physical act of perfection has to occur within ten days; it just states that the lien must be perfected within ten days. Here, that requirement was met. No transfer of the Debtor's interest in property was made on account of an antecedent debt. Execution of the security interest, creation of the debt, and a transfer of Debtor's property happened at the same time and no avoidable preference occurred.*

*This argument is buttressed by reference to Bankruptcy Code § 547(e)(1)(B) which states:*

*(B) a transfer of... property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.*

*In the present case, this means that transfer was complete when a judgment creditor of the debtor could not obtain an interest superior to the interest of GMAC. Under Oklahoma law, GMAC's security interest in the truck was perfected on Day one and no subsequent judgment creditor could obtain a superior interest in the truck.*

The case of *In re Burnett*, 14 B.R. 795 (Bkrtcy. E.D. Tenn. 1981) is also supportive. Raymond Burnett, Jr. (Burnett), Debtor, purchased and took possession of a truck on November 14, 1980. Burnett executed a Note and Security Agreement which was assigned to First Tennessee of Chattanooga (the Bank). On December 4, 1980, the Bank filed an Application for Title. On February 11, 1981, the Debtor filed a Petition under Chapter 7 of

the Bankruptcy Code and the Trustee thereafter initiated an adversary action to set aside the Bank's security interest as preferential. The Bank argued that despite its failure to file the Application for Title within 10 days, its security interest was always perfected because it filed within the 20 day grace period allowed under Tennessee State law. The Bankruptcy Court (Ralph H. Kelley, Bankruptcy Judge), while acknowledging that Congress intended for 10 days to be a uniform grace period, held that Congress must have intended perfection under § 547(c)(3) to include perfection as a matter of law by virtue of state relation-back statutes:

*It may be easiest to compare interpretations. The one that agrees with Congress's intent depends primarily on the tense of the definition. A security interest "is perfected" when a creditor "cannot" acquire a superior judicial lien. This seems to require the court to look at the facts at any moment from that perspective. Suppose that a bank has a purchase money security interest that it has not filed to perfect, but the twenty day grace period has not expired. During the grace period and before the bank files, a creditor can possibly acquire a superior judicial lien. That depends on whether the bank actually does file within the grace period. If the bank does, then its security interest will have priority because its perfection will relate back to when the security interest attached, before the creditor acquired the judicial lien. But from the creditor's perspective, it could not know that was going to happen when it acquired its judicial lien.*

*This interpretation is consistent with Congressional intent. For Article 9 security interests, perfection would begin when the last step necessary for perfection occurred, but*

*perfection would not relate back to an earlier step in the process of perfection.*

*The best way of looking at the bank's argument is to consider the definition as referring to a period of time. On that theory, the definition means a security interest is perfected during any period of time when a creditor cannot acquire a superior judicial lien. The period of time can begin before the last step necessary for perfection occurs.*

*The court believes this interpretation is the more reasonable of the two. Though both interpretations are consistent with the wording of the definition, this one is less troublesome than the interpretation that agrees with Congress's intent. That interpretation strains the wording of the definition to conclude that the court must consider the facts from an earlier perspective, rather than as they turned out.*

*This interpretation is not objectionable on the basis of the floating lien cases. In those cases the courts held security interests perfected before they were perfected under the UCC. This preference statute was meant to overrule those cases. But the problem in this case is not that the definition will allow perfection to occur before perfection under the UCC. Perfection during the grace period, even by relation back, is perfection under the UCC.*

*Thus, the court agrees with the bank's argument. Since it perfected during the grace period, its security interest was perfected from*

*the time it attached, both under state law and under the definition of perfection in the preference statute. There was no transfer on account of an antecedent debt.*

Many states have statutes that require lien notation on a Certificate of Title in order to perfect an interest in motor vehicles. Likewise, § 9-301 of the Uniform Commercial Code (which has been adopted in some form or other by virtually all states) clearly states that the filing provisions of Article 9 do not apply to purchase money security interests in motor vehicles. Thus, it is clear that Congress did not intend the 20 day relation-back period in § 547(c)(3) to apply to vehicles perfected under special State statutes exclusively governing perfection of interests in vehicles. Although the grace period in § 547(c)(3) for purchase money loans was changed from 10 days to 20 days in the 1994 amendments to the Bankruptcy Code because most states have adopted 20 day grace periods under their particular version of § 9-301 of the Uniform Commercial Code, no reference was made to State statutes specifically governing perfection of interests in motor vehicles, which often include special relation-back periods exclusively for automobile financing.

Further, a Senate debate on this precise issue reveals a plain and clear intent that the reasoning of *Busenlehner* and *Hesser* are consistent with Federal Bankruptcy Law.

Mr. Sasser: . . . I thought it would be advisable to clarify a related issue that has caused unnecessary litigation throughout the country and in my home State of Tennessee.

The issue is whether State laws that allow a longer period of time to perfect a lien by allowing the creation of the lien to "relate back" to an earlier date contravene the Federal Bankruptcy Act. While Federal bankruptcy courts have long

recognized that State law defines and governs the manner and timing of motor vehicle lien perfection, there has still been some dispute in the lower courts regarding State "relation back" statutes.

Under most state motor vehicle title perfection laws, if the requisite steps necessary for perfection are completed on a timely basis, the date of perfection "relates back" to the date the security interest was created or attached. These are commonly known as "relation back" laws. . . .

Although the new change in Federal law to 20 days would protect States like Tennessee, there are States that allow longer than 20 days to perfect the lien and have "relation back" laws that take into account each State's consideration of what is commercially reasonable and necessary to perfect a motor vehicle lien. For example, the documents necessary to perfect used car titles subject to payoff held by out-of-state institutions are not readily available. This causes a delay in the perfection process.

These "relation back" statutes protect the lien holder since the lien holder usually is not responsible for the delay. In addition, a 30 day "relation back" law is the model set out by the Uniform Vehicle Code and Model Traffic Ordinance.

**Mr. Heflin:** The Committee's decision to increase the time period to 20 days was proposed to conform bankruptcy law practices to most State's practices.

I would like to clarify just one point with the Senator from Tennessee, however. That is that while the date of perfection is determined by State law, including these "relation back" statutes, they do not affect the time of transfer pursuant to section 547. Would the Senator from Tennessee agree on that point.

**Mr. Sasser:** Yes indeed, Madam President. That would by my view also. The "relation back" provision merely relates to determining when a security interest in a motor vehicle is perfected in accordance with State law. Clarifying that "relation back" statutes are consistent with the Federal law does not change the uniformity of the Federal law. As the Chairman knows, Federal uniformity is keyed to the date on which the debtor receives possession of such property which then activates the running of the 20 day period under section 547.

**Mr. Heflin:** On this point, I wonder whether the Senator from Tennessee would cite any Federal court decisions as persuasive authority on this matter.

**Mr. Sasser:** . . . I would note for the Chairman *In Re Basenlehner*, 918 F.2nd 928 (11th Cir. 1990) (sic); *In Re Hesser*, 984 F.2nd 345 (10th Cir. 1993). The Eleventh Circuit came to a similar conclusion in the case of *In Re Howard*, 920 F.2nd 887 (11th Cir. 1991).

I would say to the Chairman that my purpose in this discussion is to establish that, although there is no statutory language to codify these Court cases, they are consistent with Federal Bankruptcy Law.

Mr. Heflin: I would say to my colleague that it is appropriate at this time for the Senate to state its intent to confirm the interpretations of these Circuits.

140 Cong. Rec. S4536-37 (1994).

The applicable vehicle perfection statute in Missouri is Mo. Rev. Stat. § 301.600.2 (1994). This statute has exclusively governed perfection of motor vehicles in Missouri since 1965. Thus, Missouri has a long-standing special statute governing perfection of interests in automobiles which specifically provides for a 30-day relation-back period. Fidelity provided financing and took steps to perfect its security interest in compliance with the aforementioned long-standing statute and "in the expectation that the creditor's compliance with State law was sufficient to protect the loan. *Busenlehner, supra*. Under Missouri law, Fidelity's lien was deemed perfected on August 17, 1994 even though the physical act of perfection occurred 21 days later, since "perfection during the grace period, even by relation-back, is perfection under the UCC." *Burnett, supra*. August 17, 1994 is also the date that Fidelity's lien was perfected for purposes of § 547 because it is the date on which "a creditor on a simple contract [could not] acquire a judicial lien" superior to Fidelity. Because the date of perfection coincides with the date of creation, the transfer of the security interest was not "for or on account of an antecedent debt" under § 547(b)(2) and was also "perfected on or before 20 days after the Debtor received possession" of the property under 547(c)(3)(B). The Chapter 13 Trustee did not meet all of the elements necessary to avoid the transfer under § 547(b) and the transfer is not subject to avoidance. *Hesser, supra*.

Fidelity concedes that there is contrary authority. See *In re Hamilton*, 892 F.2d 1230 (5th Cir. 1990); *In re Holder*, 892 F.2d 29 (4th Cir. 1989); *In the Matter of Tressler*, 771 F.2d 791 (3d Cir. 1983); *In re Loken*, 175 B.R. 56 (Bkrtcy. 9th Cir. 1994); *In re Holloway*, 132 B.R. 771 (Bkrtcy. N.D. Okla. 1991); *In re Scoviac*, 74 B.R. 635 (Bkrtcy. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445 (Bkrtcy. N.D. Tenn. 1984); *In re Walker*, 77 F.2d 322 (9th Cir. 1996).

However, few of these cases appear to involve interpretation of a long-standing State statute *exclusively* governing perfection of security interests in *automobiles* and *specifically* including a relation-back period for perfection of vehicles. The State statutes at issue in *Hamilton, Loken, Murray, Scoviac, Tressler* and *Holder* apparently did not have a specific relation-back provision under a separate vehicle perfection statute and the lienholder was therefore forced to rely on the grace period provided in § 9-301 of that particular State's version of the *Uniform Commercial Code*. Missouri itself has a 20-day grace period for non-vehicle purchase money loans (Mo. Rev. Stat. § 400.9-301).

The case of *In re Walker*, 161 B.R. 484 (Bkrtcy. D. Idaho 1993) is also distinguishable because *Walker* turned on the peculiar wording of Idaho's Motor Vehicle Statute, requiring filing of proper paperwork with the Department of Revenue, *and notation* of the security interest on the Certificate of Title. (Citing a 1982 State decision, which held that the date noted on the Certificate of Title was the date of perfection of creditor's security, in spite of the creditor's presentation of evidence that the documents had actually reached the agency earlier. As the Bankruptcy Court in *Walker* noted:

*The court here adopts the same analysis and concludes that under the statute as well as a matter of administrative practicality, the date on the title certificate constitutes the lender's perfection date. Commercial reality demands that parties be able to rely upon the lien perfection information contained in the title certificate, just as they would rely upon the other facts shown on the title. Great uncertainty would be injected into credit and other transactions involving motor vehicles if parties were allowed to impeach or contradict the lien recording information on title certificates with non-record facts. The statute*

*reflects this policy by dictating that liens are deemed perfected according to the time noted on the certificate.*

The date reflected on the Certificate of Title in the present case is the relation back date, August 17, 1994.

### CONCLUSION

Fidelity's purchase money lien was properly perfected under the applicable Missouri motor-vehicle perfection statute, and is not subject to avoidance under § 547 of the Bankruptcy Code. The reasoning of the Tenth and Eleventh Circuits in *In re Hesser* and *In re Busenlehner*, should be adopted because they involve similar State statutes with specific relation-back periods for vehicles (separate and apart from the relation-back period provided for in § 9-301 of the Uniform Commercial Code). Moreover, lenders have been relying on the 30-day grace period provided for perfecting interests in motor vehicles in Missouri since 1965, and Debtors should not be given the ability to surprise and upset established commercial practices by filing for bankruptcy and avoiding this otherwise acceptable security interest.

The Eighth Circuit decision acknowledges that compliance with Mo. Rev. Stat. § 301.600.2 (1994) results in perfection as of the date of purchase and that Fidelity did, in fact, comply with the requirements of the Mo. Rev. Stat. § 301.600.2 (1994) such as to have its lien deemed perfected on the date of purchase. Again, the fact of the matter is that no creditor on a simple contract could acquire a judicial lien that was superior to Fidelity's interest after August 17, 1994, the date of the purchase. Nevertheless, the Eighth Circuit ruled that the state relation back statute should not apply when determining preferential transfers pursuant to 11 U.S.C. § 547. Fidelity contends the Eighth Circuit's holding in this regard is contrary to the plain language of 547(e)(1)(B) and moreover with the vast body of bankruptcy cases which have determined that state law governs with regard to matters of perfection of security interests.

Wherefore, for the foregoing reasons, Fidelity respectfully requests that this Court reverse the Eighth Circuit's decision below and hold that Fidelity satisfied its burden to show that it came within the enabling loan exception to the trustee's power to avoid preferences.

Respectfully submitted:

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